BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CRYSTAL BECKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 172,229
GILBERT CENTRAL CORPORATION	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the Award dated June 6, 1996, entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on November 21, 1996.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared for the claimant. Clifford K. Stubbs of Lenexa, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director awarded claimant permanent partial disability benefits for a 35 percent work disability. The parties asked the Appeals Board to review the following issues:

(1) Whether the Kansas Workers Compensation Act is applicable to this Nebraska accident.

(2) The nature and extent of disability.

(3) Whether respondent and its insurance carrier are entitled to reimbursement from the Workers Compensation Fund.

(4) Average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Assistant Director should be affirmed.

(1) The parties stipulated that on August 5, 1992, claimant sustained personal injury by accident arising out of and in the course of employment with the respondent. Because this accident occurred in the state of Nebraska, the first issue that arose is whether the Kansas Workers Compensation Act is applicable under the provisions of K.S.A. 44-506. The Assistant Director found that the last act necessary to form the employment contract entered into between claimant and respondent occurred in Kansas and, therefore, the Kansas Workers Compensation Act was applicable. The Appeals Board agrees with that conclusion.

Claimant had previously worked for the respondent from April 1991 through December 1991 on a Manhattan, Kansas, bridge project and was laid off. Claimant returned to work for the respondent in May or June 1992 on a bridge project in Lynch, Nebraska. Claimant and her husband had planned to work in Nebraska until such time as they could return to Kansas to begin work on an Emporia project which the respondent had scheduled to begin in September 1992. While working on the Nebraska project on August 5, 1992, claimant sustained the neck injury which is the subject of this proceeding.

Claimant testified that respondent's superintendent, Denny Stoddard, telephoned her at her home in Wamego, Kansas, in May 1992 to discuss her return to work. At preliminary hearing claimant testified that Mr. Stoddard offered her a job on the Nebraska project during that conversation and that she accepted that job offer over the telephone. However, claimant also testified that she accepted the offer of employment when she arrived at the Nebraska work site. Part of the confusion lies in the manner of the attorneys' questions which asked claimant to provide legal conclusions rather than the facts surrounding the events.

Claimant also testified that she believes she was on temporary layoff during that period between the Manhattan, Kansas, and Lynch, Nebraska, projects. She testified that laid off workers are "transferred" to new projects and that returning workers are treated differently than new hires in that the returning worker's paperwork is already completed.

According to claimant, when she began the Nebraska job respondent did not require her to complete the same paperwork that was required when she initially began working for the respondent. However, respondent did require a drug test which is required of all employees every six months.

Claimant's husband, Gregory Becker, testified that he began working on the Nebraska bridge project in May 1992 and began asking Mr. Stoddard if there would be a position for claimant. According to Mr. Becker, after several conversations Mr. Stoddard told him to bring his wife to Nebraska. Before beginning work on the Nebraska project, Mr. Becker had also been on layoff status since December 1991 after having worked on the Manhattan project. However, Mr. Becker recalls completing a new job application when he reported to the Nebraska job. He described the relationship between laid off workers and respondent as one in which good workers would generally be called back to work as new projects were begun.

The job superintendent on the Nebraska bridge project, Denny Stoddard, testified that when claimant reported to Nebraska he required her to complete standard paperwork, including a new job application and undergo drug testing. He also testified that he agreed with claimant's testimony at preliminary hearing that claimant accepted employment with the respondent when she traveled to the Nebraska work site. He did not consider claimant a company employee until she had completed the required paperwork and was issued an employee number. If adverse information had been discovered in the job application or if claimant had not passed the drug test, Mr. Stoddard testified that claimant either would not have been hired or her employment would have been of short duration.

The Assistant Director found that the Kansas Workers Compensation Act was applicable to this Nebraska accident because the last act necessary to complete the employment contract was claimant's acceptance of the offered position while speaking over the telephone from her home in Wamego, Kansas. The Appeals Board agrees.

The formation of the employment contract must be considered on a case-by-case basis. Although the evidentiary record discloses little detail regarding the actual statements made by the parties, the Appeals Board finds it is more probably true than not that respondent's superintendent, Denny Stoddard, telephoned claimant and offered her employment in May 1992 and that claimant accepted that offer in that telephone conversation. The Appeals Board also agrees with the Assistant Director that the paperwork and drug tests that respondent required were merely incidental to the employment contract and were not conditions required to be satisfied before the contract was formed.

Based upon the above, the Kansas Workers Compensation Act is applicable to claimant's August 1992 accident.

(2) The Appeals Board also agrees with the Assistant Director's analysis and conclusion that claimant has sustained a 35 percent work disability as a result of the August 5, 1992, work-related accident and resulting cervical injury.

Because hers is an "unscheduled" injury, the computation of permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Utilizing the opinion of P. Brent Koprivica, M.D., the parties stipulated that claimant sustained a 12 percent whole body functional impairment for the work-related injury to her neck. The parties also stipulated to the admission of Dr. Koprivica's medical records which set forth the permanent medical restrictions that claimant must now observe due to the work-related injury. Those medical restrictions are uncontroverted. In his letter to claimant's attorney dated June 16, 1994, Dr. Koprivica wrote:

> "I have reviewed my report. I placed some restrictions on a permanent basis. Specifically, on page 4 of that report, I recommended avoidance of repetitive activities above shoulder level. In addition, I limited her to twenty pounds or less above shoulder level on an occasional basis. Finally, that report recommended avoidance of sustained or awkward postures of the cervical spine. In regard to a general restriction in regard to physical demand level of a particular activity, I would note Ms. Becker's restrictions are primarily in regard to above shoulder activities. Below shoulder level lifting is not as significantly impacted as above shoulder activities. In looking exclusively at physical demand level limitations, even if a job is in a medium physical demand level, if it requires overhead activities, I would believe she would be restricted from participating in that activity. However, accepting this, I believe in addition to the restrictions which I have just outlined, Ms. Becker should follow work activities of a medium physical demand level or less as defined by the [sic] 'The Dictionary of Occupational Titles.'"
>
> "Certainly in regard to her description of prior activities in working in the carpentry work as a bridge crew member, it would be my opinion the restrictions which I am placing would indicate she is not capable of doing that type of work."

Based upon the above restrictions, both parties' vocational experts provided their opinions regarding claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. The Appeals Board agrees with the Assistant Director's finding that the opinions of both experts, Karen Terrill and Monty Longacre, are

somewhat flawed. Ms. Terrill testified that claimant had lost 13 percent of her ability to perform work in the open labor market. However, when formulating her opinion Ms. Terrill considered claimant's restriction against repetitive activities above shoulder level to be equivalent to a restriction against climbing. The Appeals Board finds that comparison to be questionable and finds that Ms. Terrill's percentage of loss of ability to perform work in the open labor market is somewhat low. Mr. Longacre, on the other hand, neither considered the additional jobs that claimant became qualified to perform as a result of vocational rehabilitation provided by respondent nor information later provided by Dr. Koprivica that indicated claimant could perform some of the activities that Mr. Longacre believed she could not. Therefore, Mr. Longacre's opinion that claimant lost 49 percent of her ability to perform work in the open labor market is also questionable as it appears somewhat high.

Although both Ms. Terrill's and Mr. Longacre's testimony is less than perfect, it does provide sufficient basis to approximate claimant's losses. The Assistant Director averaged Ms. Terrill's and Mr. Longacre's percentages provided above and found that claimant had a 31 percent loss of ability to perform work in the open labor market. The Appeals Board agrees with that conclusion.

The Appeals Board finds the claimant has a 37 percent loss of ability to earn a comparable wage. That percentage is derived by comparing the average weekly wage claimant was earning on the date of accident, $543.75, to claimant's present average weekly wage of $344.28 which is comprised of $330 per week base wage and $14.28 per week overtime. The Appeals Board finds that comparison more indicative of claimant's loss of ability to earn a comparable wage and, therefore, rejects respondent's argument that the Appeals Board should compare claimant's present average weekly wage to a weekly average based upon claimant's annual salary for the year preceding the date of accident.

Based upon the percentages of losses indicated above, the Appeals Board finds that claimant's work disability falls somewhere between 31 and 37 percent. Therefore, the 35 percent found by the Assistant Director is reasonable, appropriate, and adopted by the Appeals Board as its finding.

(3) Respondent and its insurance carrier requested reimbursement from the Workers Compensation Fund because they contended the Kansas Workers Compensation Act did not apply to this accident. Because the Appeals Board has found the Kansas Act is applicable, the request for reimbursement from the Workers Compensation Fund must be denied.

(4) Claimant has proven an average weekly wage of $543.75. The Appeals Board adopts the Assistant Director's analysis and conclusion that claimant has failed to prove the value of the health care insurance provided by the respondent.

(5) The Appeals Board adopts the Assistant Director's findings and conclusions to the extent that they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated June 6, 1996, entered by Assistant Director Brad E. Avery should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the opinion of the majority. In our opinion, claimant has not met her burden of proving a Kansas contract of hire. Accordingly, we would not find the Kansas Workers Compensation Act applicable to this claim.

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Topeka, KS
Clifford K. Stubbs, Lenexa, KS
Brad E. Avery, Assistant Director
Office of Administrative Law Judge, Topeka, KS
Philip S. Harness, Director